Supreme Court, U.S.
FILED

991818 MAR 1 - 2000

OFFICE OF THE CLERK

No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCES L. RAMBACHER & GARY L. RAMBACHER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
Respondent.

On Petition for a Writ of Ceriorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

FRANCES L. RAMBACHER
GARY L. RAMBACHER
1208 Apache Trail
Ironton, Ohio 45638
(740) 532-5544

Questions Presented of National Importance

Did the United States Court of Appeals panel for the Sixth Circuit erroneously:

Ignore the decisions of other circuit courts:

1. Holding the safe harbor placement tax opinion protects the taxpayers from the negligence penalty as the 9th Circuit has ruled with its stand alone rationale. Balboa Energy Fund vs.Comm. 1981, et al, Docket No. 94-70260 decision of February 28, 1996 per curiam. Replacing the January 19, 1996 opinion. Supported by IRS' own IRC Section 6661 Regulation.

2. Holding that taxpayers are entitled to an explanation to their administrative waiver-abatement request (as some taxpayers receive an explanation), as the 10th Circuit has, on its own, ruled on general administrative law with its stand alone rationale so the Tax Court decision will not be tainted. The 10th Circuit Robert D. Fisher and Orpha L. Fisher, v. Comm. 95-1 USTC Para. 50,113,45F3d 396, 75 AFTR2d Par. 95-538. Also See General Administrative law circuit cites.

3. Quote the IRS's incorrect, false, misleading and fraudulent statement that the Section 6661 and cited regulations safe harbors (placement tax opinion and arguable case) do not cover and protect taxpayers from IRC section 6653 negligence penalties. The present decision could not stand had the IRS statement been correct instead of incorrect. (Cited regulation App. 36a, 43a, 44a)

Continued

Questions Presented
Of National Importance (Continued)

4. Did the United States Court of Appeals panel for the Sixth Circuit refuse to address the taxpayers' 17 reasons for abatement including "safe harbors" (placement tax opinion and arguable case) as stated in the administrative abatement request, testimony, tax court and Sixth Circuit briefs.

5. Did the United States Court of Appeals panel for the Sixth Circuit err, as the taxpayers' administrative waiver-abatement request, which the IRS refused to discuss, should be honored.

6. Did the United States Court of Appeals panel for the Sixth Circuit ignore and err on the various reasons in VI.-Note 6, page 7.

Clearly, justice has not been served and the Tax Court clearly erred and the Sixth Circuit's panel decision only reinforces the error.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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Petitioners, Frances L. Rambacher and Gary L. Rambacher, respectfully request issuance of a writ of certiorari to review the decision of the United States Court of Appeals panel for the Sixth Circuit that it is not reasonable to rely upon the safe harbor partnership placement tax opinion contrary to the Ninth Circuit Case and for refused explanation to the petitioners.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at Frances L. Rambacher and Gary L. Rambacher (App. 1a)

The decison of the Tax Court at issue in this Petition is reported at Frances L. Rambacher and Gary L. Rambacher (App. 9a)

Petitioners administrative waiver-abatement request which IRS refused explanation for a starting point. (App 52a)

STATEMENT OF JURISDICITON

The decision of the United States Court of Appeals panel for the Sixth Circuit was entered on September 28, 1999. A timely petition for rehearing was filed on November 11 , 1999. The rehearing petition was denied on December 2, 1999. A motion for explanation and correction was denied December 29, 1999.

STATEMENT OF THE CASE

The case deals with several matters of national importance. Namely, the non uniform application of penalty values among the circuits. There is conflict with the 10th and 9th Circuits. The case also deals with justice and fairness to taxpayers including administrative waiver-abatment requests explanation.

The taxpayers invested a small amount $6,250 in each year 1982 and 1983 in national partnerships with economic investment tax credit based on national publishers' sale price of book properties.

The Internal Revenue Service told the taxpayers over the many years of dispute (arguable case) that the partnerships' transactions were bonafide. The only question was profit motive. During the period the IRS represented the partnerships as bonafide, the assessed $128 negligence penalty grew to several thousand dollars on an assessed tax of $2,692.

The IRS in its discretion in 1996 issued a negligence penalty to the taxpayers. The petitioners submitted a November 12, 1996 administrative waiver-abatement request to the IRS (App. 52a). Taxpayers are expected to participate in the administrative process. The IRS in an arbitrary and capricious manner refused to explain its denial of the request when the IRS knew of its own Section 6661 safe harbors regulation (cover 6653) and the 9th Circuit Balboa case.

The petitioners took the IRS to Tax Court for relief. The Tax Court incorrectly ruled that it was unreasonable for the petitioners to rely upon the partnership's placement materials and the placement "more likely than not 50%" tax opinion. Note 1/on Pg 4 The Tax Court refused to address the other 16 administrative abatement request reasons.

The petitioners appealed to the U. S. Court of Appeals for the Sixth Circuit and numbered the reasons. The Sixth Circuit panel ruled the Tax Court did not clearly err. The Sixth Circuit panel refused to address the conflict with the other circuits, refused to address the other abatement request reasons and stated without rationale that an explanation was not available in this case. The panel also said the 6661 safe harbors (placement tax opinion and arguble case) were brought up too late and quoted the government's incorrect, false, misleading and fraudulent statement which ignored the law and cites (App 36a, 43a, 44a, 31a, 32a, 33a, 34a).

Petitioners pray for relief. The Tax Court in its recent February 8, 2000 decision for another tax year--1983 rather than address the brief 16 numbered unanswered abatement reasons including circuit conflicts, wrongfully claimed issue preclusion.

REASONS FOR GRANTING THE WRIT

A primary reason for granting the writ relates to the fundamental need of the administrative and judicial system to provide justice and fairness to taxpayers. Taxpayers need timely explanations with rationale which address all penalty abatement reasons so valuable time and resources are not lost and to avoid stress.

I. The decision conflicts with Balboa Energy, common sense and the IRS's own regulation (Pg 31a,32a,33a,34a,43a,44a)

See 9th Circuit Balboa Opinion clear stand-alone explanation and IRS's own 6661 regulations

The 6661 regulation safe harbor placement legal tax opinion 1/ clearly and indisputably covers the waiver of negligence penalty. The 9th Circuit overturned the Tax Court in clear and unarguable rationale which stands on its own. "As to the negligence penalties * * *, the Ninth Circuit ruled that it was reasonable for the limited partners to rely on the tax opinion set forth in the placement memoranda." Tax Analysts Summary of the 9th Circuit Balboa Energy Fund vs. Comm. 1981, et al, Docket No. 94-70260 decision of February 28, 1996 per curiam.

Note 1/. The second placement legal tax opinion with benefit of the first opinion states it was prepared in accordance with the tax opinion guidelines established by the IRS and the American Bar Association and clearly took in consideration the warnings. The preparer Emil Sebectic is a former IRS trial counsel attorney. See the legal opinion and summary.

II. The decision conflicts with Fisher, general administrative law in the various circuits, common sense and the IRS's own publication Your Rights as a taxpayer See Fisher Case (App. 45a)

The 10th Circuit Robert D. Fisher and Orpha L. Fisher, v. Comm. 95-1 USTC Para. 50,113,45F3d 396, 75 AFTR2d Par.95-538 explains very well:
"It is an elementary principle of administrative law that an administrative agency must provide reasons for its decisions." Harberson v NLRB, 810 F.2d 977, 984(10h Cir. 1987)(citing SEC v. Chenery Corp., 318 U.S. 80, 94 (1943)). 1/

"By failing to rule specifically on the request for waiver and by failing to offer any reasons for her decision, the Commissioner failed to demonstrate that she had exercised her discretion and thereby abused that discretion. Although the IRS attempted to justify the denial before the Tax Court, this effort was too little, too late. The IRS cannot make taxpayers haul it into Tax Court to ascertain that it has ruled on a lawful request or to discover what the rationale for its decision is." (Emphasis added)

- -

[Sub] Footnote:
1/. "[T]he administrative adjudicator, by written opinion, [must] state findings of fact and reasons that support its decision. These findings and reasons must be sufficient to reflect a considered response to the evidence and contentions of the losing party and to allow for a thoughtful judicial review if one is sought."
Public Service Co. Of New Mexico v. FERC, 832 F.2d 1201, 1207 n.5 (10th Cir. 1987) (quoting Harborlite Corp. V. ICC, 613 F.2d 1088, 1092 (D.C. Cir. 1979)).

III. The decision quotes the government IRS's false statement pertinent to the decision outcome

See IRS's Section 6661 and regulation (App.36a, 43a, 44a) for correct information.

IV. The decision ignored and refused an explanation to the other 16 abatement request reasons.

See waiver-abatement request and decisions. (App 52a)

The safe harbor placement legal tax opinion and any of the other 16 clear and unarguable reasons stand on their own and are clearly and unarguably supported by taxpayer's abatement request reasons, testimony, record, law and common sense.

V. The decision ignored the taxpayers' administrative waiver-abatement request, which the IRS refused to discuss, which should be honored

The taxpayers' administrative waiver-abatement request, which the IRS refused to duscuss, should be honored as the reasons are reasonable to abate the $128 penalty and due to the IRS' refused and too little too late explantion.

Note: Pertinent information in the petition including the appendix is underlined for ease.

The need for explanation at the administrative level is shown by the IRS's too little too late, false and misleading information in the TC decision on page 12a. The Tax Court decision states "the [operating] cash analyses, however, failed to reduce cash for the fixed rent payments." However, in the last sentence of that paragraph the decision disclosed why the statement is false and misleading. "The Offering Memorandum disclosed that the [$2 Million] contributions of the partners would be used in part to pay the [total $1,702,500] fixed rents in the first 2 years."

VI. Note 6--Decision is erred:

Clearly, the safe harbors (each, placement unambiguous "more likely than not" 50% tax opinion of Eisenberg, Honig & Fogler and arguable case (over 9 years) protect the taxpayers-limited partners from the $128 negligence penalty.

Clearly, the Tax Court decision reflecting the IRS' too little too late explanation is tainted, flawed and erred, even if for no other reason than the safe harbors (placement tax opinion and arguable case) which the taxpayers-limited partners meet.

Clearly, in the interest of justice and fairness to taxpayers, the $128 penalty (time grown to thousands) must be abated.

CONCLUSION

In view of the foregoing, the petitioners respectfullly requests that its petition for writ of certiorari be granted.

Respectfully submitted,

Frances L. Rambacher

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Petitioners
1208 Apache Trail
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APPENDIX
EMPHASIS ADDED

EXHIBIT A
Rambacher, Sixth Circuit 9/28/99 Decision
See Pertinent Pages 2a, 3a

No. 98-1792

United States Court of Appeals
for the Sixth Circuit

FRANCIS L. RAMBACHER, GARY L. RAMBACHER,
Petitioners-Appellants,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Docket No. 98-1792
Date of Decision: September 28, 1999
Judge: per curiam

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDER

Before: Merritt and Clay, Circuit Judges; Wiseman, District Judge. /*/

Rambacher, Sixth Circuit 9/28/99 Decision
See Pertinent Pages 2a, 3a

[1] Francis L. and Gary L. Rambacher appeal a Tax Court determination that they are liable for negligence penalties imposed pursuant to 26 U.S.C. section 6653(a)(1) & (2) as a result of their investment in a sham tax shelter. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

[2] By counsel, Mr. and Mrs. Rambacher filed a petition in the Tax Court for a redetermination of additions to tax totaling $2,692 as determined by the Commissioner for the tax year 1981. The government filed an answer, and the parties filed pretrial briefs. A trial was conducted before the Tax Court in 1997 at which only Mr. Rambacher testified. After further briefing, the Tax Court affirmed the Commissioner's determination in all respects. This timely appeal followed.

[3] On appeal, counsel for petitioners has withdrawn, and petitioners are proceeding pro se. In their brief on appeal, petitioners contend that: (1) a safe harbor provision precludes imposition of negligence penalties; (2) negligence penalties are improper because they acted in good faith; and (3) the Internal Revenue Service IRS did not act on their request for an abatement of the negligence penalties or otherwise explain its refusal to abate the penalties. The government responds that the Tax Court did not clearly err in its determination that petitioners were negligent.

Rambacher, Sixth Circuit 9/28/99 Decision
See Pertinent Pages 2a, 3a

[4] Upon consideration, we conclude that the Tax Court did not clearly err in its determination that petitioners were negligent for the reasons stated in its memorandum opinion filed March 30, 1998. See Pasternak v. Commissioner, 990 F.2d 893, 902 (6th Cir. 1993); Illes v. Commissioner, 982 F.2d 163, 166 (6th Cir. 1992) (per curiam), cert. denied, 507 U.S. 984 (1993); Leuhsler v. Commissioner, 963 F.2d 907, 910 (6th Cir. 1992). Further, petitioners' claim that a safe harbor provision contained in 26 U.S.C. section 6661 (repealed 1989) precludes imposition of negligence penalties was not asserted in the Tax Court and will not be considered in the first instance on appeal. See Enertech Elec., Inc. v. Mahoning County Comm'rs, 85 F.3d 257, 261 (6th Cir. 1996). Moreover, the government also correctly notes that the cited provision dealt solely with additions to tax for substantial understatement of tax, which are not at issue in this case. See Illes, 962 F.2d at 167. Finally, petitioners' contention that the IRS did not act on their request for an abatement of the negligence penalties or otherwise explain its refusal to abate the penalties is unavailing under the circumstances of this case.

[5] Accordingly, the decision of the Tax Court is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Rambacher, Sixth Circuit 9/28/99 Decision
See Pertinent Pages 2a, 3a

[signature]
Leonard Green
Clerk

FOOTNOTE
/*/ The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.
END OF FOOTNOTE

EXHIBIT B

Sixth Circuit Order Denying Rehearing 12/2/99

Case No: 98-1792

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

FILED
DEC 2 *1999* LEONARD *GREEN*, Clerk

FRANCES L. RAMBACHER; GARY L. RAMBACHER Petitioners - Appellants

V.

COMMISSIONER OF INTERNAL REVENUE

Respondent - Appellee

BEFORE: HERRITT and CLAY, Circuit Judges; WISE/IAN, District Judge*

Upon consideration of the petition for rehearing filed by the appellants,

Sixth Circuit Order Denying Rehearing 12/2/99

It is ORDERED that the petition for reheartng be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT
S Leonard green,
Leonard Green, Clerk

*The Hon. Thomas A. Wiseman, Jr, U.S. District Judge for the Middle District of Tennessee, sitting by designation.

EXHIBIT C

Sixth Circuit Order Denying motion for Explanation and Correction 12/29/99

Case No: 98-1792

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

FILED
DEC 29 1999 LEONARD GREEN, Clerk

FRANCIS L. RAMBACHER; GARY L. RAMBACHER

Petitioners Appellants

V.

COMMISSIOER OF INTERNAL REVENUE

Respondent Appellee

BEFORE: MERRITT and CLAY, Circuit Judges;
WISEMAN, District Judge*

Upon consideration of the appellants' motion for an explanation and correction which has been

Sixth Circuit Order Denying motion for Explanation and Correction 12/29/99

construed as a motion to clarify the courts disposition and rehearing denial; and the appellants' motion to stay the issuance of the mandate,

It is ORDERED that the motions be, and they hereby are, DENIED.

ENTERED BY ORDER OF THE COURT
S Leonard Green, st3
Leonard Green, Clerk

*The Hon. Thomas A. Wiseman, Jr., U,S. District Judge for the Middle District of Tennessee, sitting by designation.

APPENDIX D

Rambacher, Tax Court Opinion 3/30/98
See Pertinent Page 9a & 14a

United States Tax Court
FRANCES L. AND GARY L. RAMBACHER,
Petitioners
v.
COMMISSIONER OP INTERNAL REVENUE,
Respondent

Docket Tax Ct. Dkt. No. 11443-96
Date of Decision: March 30, 1998
Judge: Goldberg, Stanley J.

Tax Analysts Citation: 1998 TNT 61-11
Parallel Citations: T.C. Memo. 1998-124
Principal Code Reference: Section 6653(a)

Summary
Provided by Tax Analysts. Copyright 2000 Tax Analysts. All rights reserved.
COUPLE NEGLIGENTLY INVESTED IN LIMITED PARTNERSHIP; PENALTIES SUSTAINED.
Tax Court Special Trial Judge Stanley J. Goldberg has held that a couple is liable for negligence penalties with respect to their investment in a limited partnership that erroneously claimed losses from its leasing activities. Gary and Frances Rambacher contended that they exercised due care in making the investment, but Judge Goldberg said that the couple relied solely on representations of insiders, promoters, or offering materials, which is insufficient to avoid negligence penalties.

Rambacher, Tax Court Opinion 3/30/98
See Pertinent Page 9a & 14a

The court also pointed out that the offering materials contained numerous warnings and risks that should have alerted a reasonable investor.

Full Text
Provided by Tax Analysts. Copyright 2000 Tax Analysts. All rights reserved.
UNITED STATES TAX COURT
Filed March 30, 1998
Paul G. Croushore, for petitioners.
Andrew M. Winkler, for respondent.
MEMORANDUM OPINION

GOLDBERG, SPECIAL TRIAL JUDGE: This case was heard pursuant to section 7443A(b)(3) and Rules 180, 181, and 182. /1/ Respondent determined additions to petitioners' Federal income tax for the year 1981 in the amount of $128 under section 6653(a)(1) and for 50 percent of the interest due on the underpayment of income tax assessed in the amount of $2,564, pursuant to section 6653(a)(2), attributable to adjustments in the underlying partnership proceedings which resulted in automatic adjustments to petitioners' income pursuant to the provisions of the Tax Equity & Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97-248, 96 Stat. 324.

The issue for decision is whether petitioners are liable for additions to tax for negligence or intentional disregard of rules or regulations. Petitioners concede that the statute of limitations does not bar an assessment with respect to 1981.

Some of the facts have been stipulated and are so found. The stipulation of facts and the attached exhibits are incorporated herein by this reference. Petitioners resided in

Rambacher, Tax Court Opinion 3/30/98
See Pertinent Page 9a & 14a

Ironton, Ohio, at the time that they filed their petition. References to petitioner are to Gary L. Rambacher.

In 1982 petitioner received a solicitation to purchase an interest in a limited partnership, Barrister Equipment Associates Series Ninety Eight (Series 98). Petitioner received a private placement memorandum and offering summary for Series 98. Petitioner received a private placement memorandum and offering summary for Barrister Equipment Associates Series 124 (Series 124) as well. Petitioner contacted Robert Gold, a general partner involved with the promotion of the Barrister partnerships. In response to his inquiries, petitioner received another brochure that apparently addressed his remaining questions about the Barrister partnerships.

The record includes private placement memoranda for Series 98 and Series 124, and the offering summary for Barrister Equipment Associates Series 115 (Series 115). The parties have stipulated that the offering summary for Series 115 is essentially the same as the offering summaries for Series 98 and Series 124. According to the various materials, the partnerships were organized to lease literary properties for publication, distribution, and sale.

The private placement memoranda stated that the offerings were exempt from registration with the Securities and Exchange Commission. In addition, both warned that investment in the securities offered involved a high degree of risk and should not be purchased by anyone who could not afford the loss of their entire investment.

The offering summary included a chart identified as a "Typical Illustration of Anticipated Federal Tax Aspects For a Full Unit Investor". For a taxpayer in the 50-percent tax

bracket, a full unit investment was projected to yield a tax savings of 4 times the amount of cash invested in the first year and a tax savings of twice the amount of cash invested in the second year.

Under the lease agreements entered into by the partnerships, the partnerships were required to pay both a fixed rent and a variable rent during the first 2 lease years. The offering memoranda for Series 98 and Series 124 include summaries of lease payments and cash-flow analyses for the partnerships. The first part of the cash-flow analyses reflected the projected cash generated on the initial printings of the book properties based on net sales, the gross retail sales less the distributors discount, less rent. These analyses projected cash to partnership totaling $67,528 and $99,672 for Series 98 and Series 124, respectively. The analyses, however, failed to reduce cash for the fixed rent payments. In the first 2 years, fixed rents totaling $1,242,500 and $1,702,500 were payable by Series 98 and Series 124, respectively. Further, the offering summaries warned that although a cash-flow analysis was included in the offering materials, no representations or warranties were intended or should have been inferred as to any economic return. The Offering Memorandum disclosed that the capital contributions of the partners would be used in part to pay the fixed rents in the first 2 years.

The Private Placement Memorandum for Series 98 stated:

In order for the Partnership to realize sufficient revenues from sales of the Books (after the payment of distribution costs) to satisfy the lease payments for the Book Properties relating to each Literary Work a very substantial number of Books will have to be sold. * * * The number of Books required to be sold to return a profit to the Partnership in

almost all cases greatly exceeds the industry average. * * * Accordingly, there is a high degree of probability that exploitation of the Book Properties relating to any one of the Literary Works will not yield a profit to the Partnership and that an investor may not recoup all or any portion of his cash investment in the Partnership.

Similarly, the Memorandum for Series 124 stated:

Although the appraisals support the value of Properties on both the Lessor and Partnership levels, there is no guarantee that all or any of the Books or Disks will achieve the level of sales necessary to result in Partnership profits. The Services Contractors have agreed to use their best efforts but are not bound by any minimum performance requirement.

[10] In addition, the private placement memoranda for Series 98 and Series 124 included unsigned proposed tax opinion letters. The letter for Series 98 cautions:

Although the opinions may be deemed an indication of the fair market value of the Book Properties, they will be estimates only, and cannot be regarded as definitive with respect thereto.

It is highly likely that unless a Book achieves substantial sales, the IRS will not agree with the appraised value therefor. We have made no independent investigation as to the fair market value of any of the Book Properties.

Rambacher, Tax Court Opinion 3/30/98
See Pertinent Page 9a & 14a

[11] Petitioner decided to invest in Series 98 and Series 124 based upon the information contained in the offering materials. His review of these materials primarily focused on the cash-flow analyses and the proposed tax opinion letters. Petitioners invested $6,250 in Series 98 in 1982, and in 1983 they invested $6,250 in Series 124. Petitioners invested with others in the partnerships through AB Trust and Equipment Investors which were listed as the partners on the Schedules K-1 issued by the partnerships.

[12] Prior to investing in the Barrister partnerships, petitioners did not have any knowledge about the book publishing industry. Petitioner is a certified public accountant with 30 years of experience in public accounting. Mrs. Rambacher is an accountant and helps petitioner in his accounting practice. The bulk of petitioner's practice is devoted to tax and accounting work. Petitioners had some prior investment experience before investing in the Barrister partnerships. Their tax returns for the years in issue reflect dividend income, interest income, and capital gains from sales of stock.

[13] Petitioner offered some advice to a few investors concerning the Barrister partnerships, and received fees from these persons for his analysis of financial data pertaining to the partnerships. Petitioner received a monetary rebate from Barrister for securing other investors, including his mother and brother, in the partnerships.

Rambacher, Tax Court Opinion 3/30/98
See Pertinent Page 9a & 14a

[14] The partnership returns for Series 98 and Series 124 reported partnership losses and investment tax credit (ITC) basis in the following amounts:

Series 98	Loss	ITC Basis
1982	$480,725	$13,515,000
1983	899,655	3,290,000
Series 124		
1983	611,814	20,799,000
1984	1,235,173	4,117,230

The Schedules K-1 issued for AB Trust and Equipment investors reflect the following allocations:

Series 98	Loss	ITC Basis
1982	$7,880	$221,551
1983	14,748	53,933
Series 124		
1983	11,330	385,177
1984	22,874	76,247

[15] On their 1983 return, petitioners claimed flow-through losses of $4,896 from their interests in Series 98 and Series 124. On Schedule E of their 1983 return, petitioners claimed net losses of $3,687 and $1,209, identifying "Barrister Equip." as the source of the losses and listing a corresponding partnership identification number for each loss. On Form 3468 of their 1983 return and for purposes of computing the investment tax credit, petitioners listed total qualified investment in the amount of $43,970. Petitioners claimed entitlement to a tentative investment tax credit of $4,397

subject to a tax liability limitation of $1,833 for 1983. On August 24, 1984, petitioner filed Form 1045, Application for Tentative Refund, claiming an investment tax credit carry back of $2,564 from 1983 against their tax liability for 1981.

[16] Respondent sent separate Notices of Beginning of Administrative Proceeding at the Partnership Level (NBAPP) and Notices of Final Partnership Administrative Adjustments (FPAA) for tax years 1982 and 1983 for Series 98 to petitioners. Respondent also sent separate NBAPP's and FPAA's for the tax years 1983 and 1984 of Series 124 to petitioners.

[17] The Court entered a stipulated decision in the underlying partnership proceeding, Anderson Equip. Associates v. Commissioner, at docket No. 27745-89, on February 17, 1995. The decision provided that the losses claimed by Series 98 for 1982 and 1983 and Series 124 for 1983 and 1984 were not allowed, and that the amount of qualified investment property held by Series 98 and Series 124 was zero for the aforementioned years as well. Pursuant to section 7481, that decision became final on May 18, 1995, and, thereafter, respondent assessed taxes against petitioners for 1981, 1982, 1983, and 1984 as computational adjustments. On March 5, 1996, respondent issued a notice of deficiency to petitioner for 1981.

[18] Section 6653(a)(1) provides for an addition to tax equal to 5 percent of any underpayment if any part of the underpayment is due to negligence or intentional disregard of rules or regulations. Section 6653(a)(2) provides for an addition to tax in the amount of 50 percent of the interest payable on the portion of any underpayment of tax which is attributable to negligence or intentional disregard of rules or

regulations. Negligence is defined as the lack of due care or the failure to do what a reasonable and ordinarily prudent person would do under the circumstances. Neely v. Commissioner, 85 T.C. 934, 947 (1985). Petitioners bear the burden of proving that no part of the underpayment for the year in issue was due to negligence or intentional disregard of rules or regulations. Rule 142(a); Bixby v. Commissioner, 58 T.C. 757 (1972).

[19] Petitioners contend that they exercised due care with respect to their investment in the Barrister partnerships because they reasonably relied upon the information contained in the offering materials. Petitioners also contend that they were not negligent because they reasonably expected that the partnerships might be profitable. Petitioners do not assert that they relied on any representations as to the tax treatment of the items passed through to them by the partnerships; rather their argument seems to be that if they were not imprudent in investing in the partnerships, then they were not negligent in claiming the deductions and investment tax credit basis flowing therefrom. Assuming arguendo that we agreed with this conclusion, petitioners have not established that they acted reasonably with respect to their investments in Series 98 and Series 124.

[20] Petitioner testified that he completed a substantial evaluation of the potential profitability of the Barrister partnerships. Petitioner, however, relied solely on the information contained in the offering materials, particularly the cash-flow analyses. Reliance on representations by insiders, promoters, or offering materials has been held an inadequate defense to negligence. Rybak v. Commissioner, 91 T.C. 524, 565 (1988); Freytag v. Commissioner, 89 T.C. 849, 889

(1987), affd. 904 F.2d 1011 (5th Cir. 1990), affd. 501 U.S. 868 (1991); Coggin v. Commissioner, T.C. Memo. 1993-209, affd. 71 F.3d 855 (11th Cir. 1996); Klieger v. Commissioner, T.C. Memo. 1992-734. In addition, a thorough review of the materials indicates that the cash-flow analyses were incomplete and could not be relied on as projections of income or loss or profitability of the partnerships. Furthermore, the offering materials contained numerous warnings and risks. Petitioner testified that he thought the tax opinion letters were conservative, but he gave no explanation for his conclusion. We think that the cautionary statements in the materials would have alerted a reasonable investor that the projected cash-flow, deductions, and credits of the partnership were questionable. See Estate of Hogard v. Commissioner, T.C. Memo. 1997-174.

[21] Petitioner testified that he talked with Bob Gold, a general partner in one of the Barrister entities; however, petitioner could not recall the content of the conversations. Most, if not all of the conversations, occurred subsequent to petitioners' investment in the Barrister partnerships and apparently concerned the administrative proceedings at the partnership level. Thus, it does not appear that such action was aimed at monitoring petitioners' investment. See, e.g., Heasley v. Commissioner, 902 F.2d 380 (5th Cir. 1990), revg. T.C. Memo. 1988-408.

[22] In addition, petitioners argue that they acted in good faith and disclosed sufficient information on their return, and therefore no additions should apply under section 6653(a). Petitioners rely on Belz Investment Co. v. Commissioner, 72

T.C. 1209 (1979), affd. 661 F.2d 76 (6th Cir. 1981); Wesley Heat Treating Co. v. Commissioner, 30 T.C. 10 (1958), affd. 267 F.2d 853 (7th Cir. 1959); Pullman, Inc. v. Commissioner, 8 T.C. 292 (1947); and Cryder v. Commissioner, T.C. Memo. 1977-103. Petitioner's reliance is misplaced.

[23] Petitioners did not provide sufficient information to apprise respondent of their position on their return. In fact, there is no reference on petitioners' return to the Barrister partnerships in respect of petitioners' claimed ITC. We do not believe that the mere listing of tax identification numbers of the partnerships on Schedule E of their 1983 return constitutes sufficient information to apprise respondent that there was any issue with petitioners' treatment of the ITC.

[24] Finally, petitioners argue that respondent has forced petitioners to petition this Court in an attempt to discern the basis for the deficiencies asserted against them. Petitioner's argument seems to be that respondent should be equitably estopped from assessing the deficiencies.

[25] Petitioners contend that they have made repeated attempts to find out the basis for respondent's position on the basis for the additions, starting as far back as 1986 or 1987. From the record, it does not appear that respondent has misled petitioners. Petitioners were informed of the partnership proceedings. The additions to tax were not determined until 1996, after the partnership proceedings were completed. Respondent could not give petitioners any explanation for the additions as far back as 1986 or 1987.

[26] Petitioners argue that Fisher v. Commissioner, 45 F.3d 396 (10th Cir. 1995), revg. in part and remanding T.C. Memo.

1992-740, supports their position. Petitioners' reliance on Fisher v. Commissioner, supra, is also misplaced. That case involved a request for a waiver of additions to tax under section 6661(c). Based on the record, the Court of Appeals found that the Commissioner had not issued a denial with respect to the request, but instead had issued a notice of deficiency. The Court of Appeals reasoned that this Court could not have determined whether the Commissioner had abused his discretion in denying the waiver because no formal denial had ever been made; therefore, the case was remanded, and the Commissioner was ordered to reconsider the request for waiver and provide a written explanation for the decision. The Court did not hold that the Commissioner's failure resulted in waiver of the addition to tax.

[27] We have considered all of the arguments and contentions presented by petitioners, and, to the extent not discussed above, we have found them to be without merit or not relevant. Respondent's determination is sustained.

[28] To reflect the foregoing,

[29] Decision will be entered for respondent.

FOOTNOTE

/1/ Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

END OF FOOTNOTE

EXHIBIT E

Balboa Energy 9th Circuit
See Pertinent Pages 31a, 32a, 33a, 34a

United States Court of Appeals for the Ninth Circuit
BALBOA ENERGY FUND 1981, REGIONAL RESOURCES, INC., TAX MATTERS PARTNER,
Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE SERVICE,
Respondent-Appellee.

Docket No. 94-70260
Date of Decision: February 28, 1996
Judge: per curiam

Tax Analysts Citation: 1996 TNT 47-18
Parallel Citations: 77 AFTR2d Par. 96-540
Principal Code Reference: Section 162

Summary
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NINTH CIRCUIT ISSUES NEW OPINION IN BALBOA ENERGY FUND.
The Ninth Circuit has issued a new memorandum opinion in Balboa Energy Fund 1981 v. Commissioner, affirming a Tax Court decision sustaining deficiencies against three oil and gas limited partnerships and their limited partners. The appeals court, however, reversed the imposition of negligence and

substantial understatement penalties. This new opinion is largely identical to the opinion issued by the Ninth Circuit on January 19, which was withdrawn. (For a full summary of the court's opinion, see Tax Notes, Feb. 5, 1996, p. 687.)
Full Text
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Tax Court No. 13686-87

KAREN KUSTER, AKA KAREN G. KUSTER,
Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE SERVICE,
Respondent-Appellee.

No. 94-70264
Tax Court No. 21489-85

DRAKE ENERGY FUND 1983, REGIONAL RESOURCES, INC., TAX MATTERS PARTNER,
Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent-Appellee.

No. 94-70275
Tax Court No. 13367-87

DON A. KUSTER; JANE A. KUSTER,
Petitioners-Appellants,
v.
COMMISSIONER OF INTERNAL REVENUE SERVICE,
Respondent-Appellee.

No. 94-70276
Tax Court No. 21727-85

KAREN KUSTER, AKA KAREN G. KUSTER,
Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE SERVICE,
Respondent-Appellee.

No. 94-70277
Tax Court No. 21522-88

Balboa Energy 9th Circuit
See Pertinent Pages 31a, 32a, 33a, 34a

DON A. KUSTER; JANE A. KUSTER,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent-Appellee.

No. 94-70281
Tax Court No. 38088-85

MESHUMU ENERGY PARTNERS, LTD., REGIONAL RESOURCES, INC.,

TAX MATTERS PARTNER,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVERNUE SERVICE,

Respondent-Appellee.

No. 94-70282
Tax Court No. 12259-87

APPEAL FROM A DECISION OF THE UNITED STATES TAX COURT

Balboa Energy 9th Circuit
See Pertinent Pages 31a, 32a, 33a, 34a

Argued and Submitted November 15, 1995
Pasadena, California

Before: Fletcher, Canby and Hawkins, Circuit Judges.

MEMORANDUM /*/

[1] We review the Tax Court's finding that certain oil and gas partnerships were not engaged in a trade or business and whether the Tax Court properly upheld the Tax Commissioner's imposition of additions to tax and additional interest against the partners.

I. GENERAL BACKGROUND

[2] The Commissioner sent petitioners Karen G. Kuster, Don A. Kuster and Jane A. Kuster notices determining deficiencies in income tax, additions to tax, and additional interest for the tax years 1981 and 1982. The deficiencies were attributable to the Commissioner's disallowance of certain deductions claimed as a result of the Kusters' participation as limited partners in Balboa Energy Fund 1981, Ltd. ("Balboa"), an oil and gas partnership. The Commissioner also sent petitioners Balboa, Drake Energy Fund 1983, Ltd. ("Drake") and Meshumu Energy Partners, Ltd. ("Meshumu"), all oil and gas partnerships, notices of final partnership administrative adjustments for the 1983 tax year.

[3] Petitioners filed timely petitions in the Tax Court challenging the proposed deficiencies and partnership administrative adjustments. The parties stipulated that if the Tax Court's opinion was consistent as to Balboa and Drake (collectively, "the Partnerships"), which it was, the result

would control all partnerships involved. The parties also stipulated that the application of penalties against V.E. Kuster Co., Inc. would control the penalty issues involving the other petitioners.

[4] The Tax Court upheld the Commissioner's deficiency determination on the ground that Balboa and Drake were not engaged in a trade or business within the meaning of section 162 of the Tax Code because they lacked a profit objective. The Tax Court also concluded that V.E. Kuster Co., Inc. was responsible for additions to tax under section 6653 and 6661(c) and an increased rate of interest pursuant to section 6621(c). Petitioners timely appealed.

II. FACTUAL BACKGROUND

[5] Balboa and Drake were oil and gas partnerships established in the early 1980's by Roy Osterhout, a CPA. Reserve Resources, Inc. ("Reserve") was the General Partner. Osterhout was Reserve's president. Private placement memoranda regarding these partnerships were sent to Osterhout's accounting clients. The memoranda emphasized the tax benefits of these programs.

[6] Balboa and Drake entered into subleases with several drillers pursuant to which the drillers were paid a set price to drill wells. The drillers were also entitled to a minimum annual royalty ("MAR") upon execution of the sublease and every year thereafter unless or until the sublease was canceled or until the Partnerships exercised the option to purchase the wells. The payment of the minimum annual royalty could be deferred for 12 years; however, in order to defer payment, the Partnerships were required to deliver to the drillers

Assumptions of Liability whereby each of the limited partners agreed to assume primary personal responsibility, to a stated maximum, for the payment of each limited partner's pro rata share of the deferred amounts. Any deferred amounts remaining unpaid at the end of twelve years were due and payable without interest at that time.

[7] The drillers were also entitled to a set percentage of the oil and gas revenue, known as a production royalty, from which they were responsible for the disbursement of the existing overriding royalty interests. Prior to the due date of the deferred MAR payment, the payment of the production royalty was to be credited against the amount of deferred MAR owed.

III. ANALYSIS

A. LEGAL FRAMEWORK FOR RESOLVING THIS APPEAL AND STANDARD OF REVIEW

[8] Section 162 of the Internal Revenue Code allows the deduction of ordinary and necessary expenses paid or incurred in connection with the operation of a trade or business. For an activity to generate deductions under section 162, the taxpayer must show "'that the activity was entered into with the dominant hope and intent of realizing a profit.'" Vorsheck v. Commissioner, 933 F.2d 757, 758 (9th Cir.) (quoting Brannen v. Commissioner, 722 F.2d 695, 704 (11th Cir. 1984)), cert. denied, 502 U.S. 984 (1991). In the case of a limited

partnership, profit motive is determined at the partnership level. Vorsheck, 933 F.2d at 758.

[9] The proper focus of the profit motivation test is on the taxpayer's subjective intent. Skeen v. Commissioner, 864 F.2d 93, 94 (9th Cir. 1989). However, the court may consider objective factors in determining that intent. Id. A "taxpayer's venture is a trade or business if he has a good faith expectation of profit . . . irrespective of whether or not others might view that expectation as reasonable." Mercer v. Commissioner, 376 F.2d 708, 711 (9th Cir. 1967).

[10] A finding that an activity is not undertaken for profit is a factual finding reviewed for clear error. Polakof v. Commissioner, 820 F.2d 321, 323 (9th Cir. 1987), cert. denied, 484 U.S. 1025 (1988); Sochin v. Comissioner, 843 F.2d 351, 353 (9th Cir.), cert. denied, 488 U.S. 824 (1988). We will uphold the Tax Court's finding that an activity is not undertaken for profit unless we are "'left with the definite and firm conviction that a mistake has been committed.'" Wolf v. Commissioner, 4 F.3d 709, 712 (9th Cir. 1993) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). If the Tax Court's "account of the evidence is plausible in light of the record viewed in its entirety, [we] may not reverse it even though convinced that had [we] been sitting as the trier of fact, [we] would have weighed the evidence differently." Wolf, 4 F.3d at 712-13 (internal citations omitted).

B. THE TAX COURT'S FINDING THAT THE PARTNERSHIPS WERE NOT ENGAGED IN FOR PROFIT IS NOT CLEARLY ERRONEOUS.

[11] The Tax Court's account of the evidence is plausible in light of the record viewed in its entirety, and, therefore, we

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will not disturb its ruling. Id.

[12] We cannot find fault with the Tax Court's finding that the emphasis of the Partnerships' promotional materials on the tax benefits of the programs suggests a tax motivation. Other courts have found tax motivation apparent where, inter alia, tax benefits are the focus of promotional materials. See Ferrell v. Commissioner, 90 T.C. 1154, 1182 (1988); Rose v. Commissioner, 88 T.C. 386, 412 (1987), aff'd, 868 F.2d 851 (6th Cir. 1989).

[13] The record supports the Tax Court's finding that the Partnerships had a dominant motive of producing tax savings because the partners would benefit even if the Partnerships were not profitable. Petitioners concede that this finding is plausible assuming the deferred minimum annual royalty was not intended to be paid. We believe that the Tax Court's finding that the deferred minimum annual royalty was not intended to be paid at the end of 12 years is supported by (1) Mr. Osterhout's inability to recall the amount owed to a particular driller or to explain how it would be paid, and (2) Allen's failure to attempt to recover the minimum annual royalty due him. Petitioners contend that the Tax Court erroneously found the MAR liability to be illusory by failing to understand that it was intended to be paid in large measure through production. For the reasons explained below, we find that the Tax Court did not err in finding that the minimum annual royalty was unlikely to be paid through production due to unreasonable reserve and price assumptions. Moreover, we disagree with petitioners that the Tax Court erred in failing to note that a "significant" amount of the assumed liability was in

fact paid through production. In the case of one of Balboa's subleases, the partners assumed a total MAR liability of $1 million dollars, of which a mere $41,671 was repaid through production. In the case of a sublease entered into by Drake, the MAR liability assumed by the partners was $882,000, of which only $286,444 was repaid through production.

[14] The Tax Court's finding that an "oil and gas business conceived with the notion of making a profit would not obligate itself to these types of MAR payments" is supported by the testimony of the Commissioner's expert. That testimony established that the MAR so burdened the Partnerships' cash flow that, under reasonable reserve and price expectations, the Partnerships could not have been profitable.

[15] Petitioners contend that the Tax Court clearly erred in finding that the "promotional values pertaining to the prospective oil and gas production were inflated" because the Tax Court failed to explain why it was "not convinced of the accuracy of the geology reports." The record, however, contains substantial evidence suggesting that the reserve estimates were inflated. For example, one report introduced at trial states that the estimate of 16,000 barrels of recoverable oil per well used for purposes of Balboa's financial projections "cannot be supported by actual prior drilling results" for the surrounding area. The report also concludes that the projections for the wells involved in the Drake venture were unrealistic.

[16] Nor did the Tax Court clearly err in finding that the Partnerships' price projections were unreasonable. As the Tax Court noted, petitioners' expert's opinion regarding the

reasonableness of Balboa's projection that oil prices would escalate 10% a year is unreliable because the 1982 survey upon which the expert based his opinion did not, as the expert stated, predict a 10% a year increase in gas prices. Also, the exhibit upon which petitioners rely in support of their argument that their price forecasts were within the range of normal price forecasting deviations is of little, if any, probative value in determining whether petitioners' 1981 and 1983 forecasts were reasonable. That exhibit sets forth price forecasts made in 1991 for the years 1991 through 2000.

[17] The Tax Court did refer to a 1987 publication regarding historical oil prices as evidence that the Partnerships' price forecasts were unreasonable. The use of this publication, which was not in existence at the time the Partnerships were conceived, is not impermissible because the information in this publication upon which the Tax Court relied -- the average price of gas in 1981 and 1982 -- was presumably in existence at the time the Partnerships were formed in late 1981 and 1983.

[18] In conclusion, because we are not "left with the definite and firm conviction that a mistake has been committed," Wolf, 4 F.3d at 712, we will not disturb the Tax Court's decision affirming the Commissioner's deficiency determination.

C. THE TAX COURT ERRED IN UPHOLDING THE COMMISSIONER'S ADDITIONS TO TAX PURSUANT TO 26 U.S.C. SECTIONS 6653 AND 6661 BUT NOT IN APPLYING AN INCREASED RATE OF INTEREST.

[19] The Commissioner contends that we cannot hear petitioners' appeal regarding the Tax Court's imposition of

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See Pertinent Pages 31a, 32a, 33a, 34a

additions to tax and an increased rate of interest because, as noted by the Tax Court, petitioners stipulated to be "bound" by the Tax Court's opinion regarding the application of the additions to tax and increased rate of interest in the case of V.E. Kuster Co., Inc. We find no reference to a waiver of appeal rights in the parties' stipulation. **Waiver is not easily inferred**. We will draw no such inference here. We interpret the agreement of the parties to be that the facts found in relation to V.E. Kuster Co., Inc. would be applicable to all, obviating duplicative proceedings before the Tax Court. Nothing suggests that petitioners waived their right to appeal the decision. Therefore, we address the merits of their arguments.

[20] 26 U.S.C. section 6653(a), prior to its amendment, provided for an addition to tax for underpayment due to "negligence," which was defined by reference to the reasonable person standard. Sammons v. Commissioner, 838 F.2d 330, 337 (9th Cir. 1988). Petitioners contend that Kuster was not negligent because he relied upon the advice of Osterhout, his CPA for 22 years, the accounting firm of Cooper & Lybrand, which prepared the returns, and the tax opinions contained in the placement memoranda. Although a reasonable and prudent person is entitled to rely on the advice of qualified experts, Sammons, 838 F.2d at 337, the Tax Court is correct that petitioners' reliance on statements made by Osterhout was not reasonable because he was acting as a promoter. See Rybak v. Commissioner, 91 T.C. 524, 565 (1988) (taxpayer who does no more than inquire of the promoter whether the investment is sound will not overcome

the negligence penalty). Furthermore, petitioners fail to explain why the Tax Court clearly erred in finding that Kuster's meeting with tax advisors at Coopers & Lybrand was "perfunctory" and did not constitute a "meaningful investigation." See Norgaard v. Commissioner, 939 F.2d 874, 877 (9th Cir. 1991) (reviewing the Tax Court's determination that petitioners are liable for additions to tax under section 6653(a) for clear error). Nonetheless, we conclude that the Tax Court clearly erred in finding that it was unreasonable for Kuster to rely on the tax opinion of Martin, Davis & Deacon contained in the placement memoranda. Absent some evidence that would tell a prospective investor that the opinion of a reputable CPA or law firm should be suspect, we find such reliance to be reasonable under the circumstances. /1/ Consequently, we reverse the Tax Court's imposition of additions to tax pursuant to section 6653(a).

[21] 26 U.S.C. section 6661 /2/ imposed a penalty on a "substantial underpayment" of tax. In the case of "tax shelter" activity, a penalty could not be imposed where there "is or was substantial authority for such treatment" and the taxpayer "reasonably believed that the tax treatment of such item by the taxpayer was more likely than not the proper treatment." 26 U.S.C. section 6661(b)(2)(C)(i)(II). Such a belief could be established if the taxpayer in good faith relied on the opinion of a professional tax advisor that "unambiguously states that the tax advisor concludes that there is a greater than 50-percent likelihood that the tax treatment of the item will be upheld in litigation if the claimed tax treatment is challenged by the Internal Revenue Service." Reg. section 1.6661-5(d)(2).

[22] Both the Balboa and Drake Memoranda included a

detailed opinion of counsel stating that it was "more likely than not" that the courts would sustain the tax treatment of each item if challenged by the IRS. The Commissioner fails to explain why this opinion does not satisfy the requirements of Reg. section 1.6661-5(d)(2). Furthermore, the Commissioner's contention that reasonable taxpayers could not have believed that they could deduct expenses not attributable to a profit-making activity misses the mark. The real issue is whether a reasonable taxpayer could have believed that these partnerships would be considered profit-making ventures by the IRS. We find that in light of the above opinion, a reasonable taxpayer could have so believed.

[23] Because petitioners are not subject to a penalty pursuant to 6661(b)(2)(C)(i)(II), we need not decide whether the Commissioner abused his discretion in refusing to waive the penalty pursuant to section 6661(c).

[24] Finally, 26 U.S.C. section 6621(c) (formerly 26 U.S.C. section 6621(d)) provides for a rate of interest on substantial underpayment attributable to certain "tax motivated transactions" at 120% of the normal underpayment rate. Pursuant to Reg. section 301.6621-2T, transactions not entered into for profit are treated as "tax motivated transactions." Because the Tax Court's finding that the Partnerships were not engaged in for profit is not clearly erroneous, neither is its decision upholding the Commissioner's decision to impose an increased rate of interest pursuant to 26 U.S.C. section 6621(c).

[25] AFFIRMED in part and REVERSED in part. Each party will bear its own costs.

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See Pertinent Pages 31a, 32a, 33a, 34a

FOOTNOTES

/*/ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

/1/ Cf. Horn v. Commissioner, 90 T.C. 908, 941-2 (1988) (for purposes of section 6653(a), it was unreasonable for taxpayers to rely on opinions of accountants and others who were compensated by the promoter for the units sold to petitioners and, therefore, were not independent of the promotion).

/2/ 26 U.S.C. section 6661 was repealed in 1989 but was in effect at all times relevant to this matter.

END OF FOOTNOTES

EXHIBIT F

SAFE HARBORS-IRS' OWN REGULATIONS

See Pertinent Page 36a

IRS's own regulation 1.6661-3(a)(2)

Sec. 1.6661-3 Substantial authority.

(a) General rule--

(1) Effect of having substantial authority.

If there is or was substantial authority for the tax treatment of an item (other than a tax shelter item as defined in section 1.6661-5(c)), the item is treated as if it were shown properly on the return for the taxable year in computing the amount of tax shown on the return. Thus, for purposes of section 6661, the tax attributable to the item is not included in the understatement for the year. (See paragraph (d)(2) of section 1.6661-2.)

(2) Substantial authority standard.

The substantial authority standard is less stringent than a "more likely than not" standard (that is, a greater than 50-percent likelihood of being upheld in litigation), but stricter than a reasonable basis standard (the standard which, in general, will prevent imposition of the penalty under section 6653 (a), relating to negligence or international disregard of rules and regulations). Thus, a position with respect to the tax treatment of an item that is arguable but fairly unlikely to prevail in court would satisfy a reasonable basis standard, but not the substantial authority standard.

(b) Determination of whether substantial authority is present--

(1) Evaluation of authorities.

There is substantial authority for the tax treatment of an item only if the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting

SAFE HARBORS-IRS' OWN REGULATIONS

See Pertinent Page 36a

contrary positions. All authorities relevant to the tax treatment of an item, including the authorities contrary to the treatment, are taken into account in determining whether substantial authority exists and the weight of those authorities is determined in light of the pertinent facts and circumstances in the manner prescribed in paragraph (b)(3) of this section. There may be substantial authority for more than one position with respect to the same item. The taxpayer's belief that the authorities with respect to the tax treatment of an item constitute substantial authority is not taken into account in determining whether there is substantial authority.

(2) Types of authority.

In determining whether there is substantial authority (other than in cases described in paragraph (b) (4) (i) of this section), only the following will be considered authority. Applicable provisions of the Internal Revenue Code and other statutory provisions; temporary and final regulations construing such statutes; court cases; administrative pronouncements (including revenue rulings and revenue procedures); tax treaties and regulations thereunder, and Treasury Department and other official explanations of such treaties; and Congressional intent as reflected in committee reports, joint explanatory statements of managers included in conference committee reports, and floor statements made prior to enactment by one of a bill's managers. Conclusions reached in treatises, legal periodicals, legal opinions or opinions rendered by other tax professionals, descriptions of statutes prepared after enactment (such as "General Explanations" prepared by the Staff of the joint Committee on Taxation), general counsel

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See Pertinent Page 36a

memoranda (other than those published in pre-1955 volumes of the Cumulative Bulletin), actions on decisions, technical memoranda, written determinations (except as provided in paragraph (b)(4)(i) of this section), and proposed regulations are not authority. The authorities underlying such expressions of opinion where applicable to the facts of a particular case, however, may give rise to substantial authority for the tax treatment of an item. (See section 1.6661-6(b), however, regarding waiver of the penalty when the taxpayer relies on proposed regulations.)

(3) Nature of analysis.

Except as otherwise provided in this section, the weight of the authorities for the tax treatment of an item is determined by the same analysis that a court would be expected to follow in evaluating the tax treatment of the item. Thus, the weight of authorities depends on their persuasiveness and relevance as well as their source. For example, a case or revenue ruling having some facts in common with the tax treatment at issue would not be considered particularly relevant if the authority is materially distinguishable on its facts, or is otherwise inapplicable to the tax treatment at issue. Similarly, an authority that merely states a conclusion ordinarily would be given less weight than an authority that reaches its conclusion by cogently relating the applicable law to pertinent facts. There may be substantial authority for the tax treatment of an item despite the absence of certain types of authority. Thus, a taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision.

SAFE HARBORS-IRS OWN REGULATIONS

See Pertinent Page 36a

(4) Special rules--

(i) Written determinations.

There is substantial authority for the tax treatment of an item if the treatment is supported by the holding of a ruling or a determination letter (as defined in section 301.6110-2 (d) and (e)) issued to the taxpayer, by the holding of a technical advice memorandum in which the taxpayer is named, or by an affirmative statement in a revenue agent's report with respect to a prior taxable year of the taxpayer ("written determinations"). The preceding sentence shall not apply, however, if there has been a misstatement or omission of a material fact, the facts that subsequently develop are materially different from the facts on which the written determination was based, or authority supporting a contrary position has arisen since the date of the written determination.

(ii) Taxpayer's jurisdiction.

The applicability of court cases to the taxpayer by reason of the taxpayer's residence in a particular jurisdiction is not taken into account in determining whether there is substantial authority for the tax treatment of an item. Notwithstanding the preceding sentence, however there is substantial authority for the tax treatment of an item if the treatment is supported by controlling precedent of a United States Court of Appeals to which the taxpayer has a right of appeal with respect to the item.

SAFE HARBORS-IRS OWN REGULATIONS

See Pertinent Page 36a

(iii) When substantial authority determined.

For purposes of section 6661, there is substantial authority for the tax treatment of an item if there is substantial authority at the time the return containing the item is filed or there was substantial authority on the last day of the taxable year to which the return relates.

[T.D. 8017, 50 FR 12016, Mar. 27, 1985]

EXHIBIT G

SAFE HARBORS-IRS' OWN REGULATIONS

See Pertinent Pages 43a, 44a

Sec. 1.6661-5 Items relating to tax shelters.

(a) In general.

(1) Tax shelter items (as defined in paragraph (c) of this section) are treated as if such items were shown properly on the return for the taxable year in computing the amount of tax shown on the return if--

(i) There is or was substantial authority for the tax treatment of the items (as provided in section 1.6661-3); and

(ii) The taxpayer reasonably believes at the time the return is filed that the tax treatment claimed is more likely than not the proper tax treatment of the items (see paragraph (d) of this section).

Thus, for purposes of section 6661, the tax attributable to such items is not included in the understatement for the year. (See paragraph (d)(2) of section 1.6661-2.)

(2) Disclosure (whether or not adequate under section 1.6661-4) with respect to tax shelter items (as defined in paragraph (c) of this section) does not affect the amount of the understatement.

(b) Tax shelter--

(1) In general.

For purposes of section 6661, the term "tax shelter" means--

(i) A partnership or other entity (such as a corporation or trust),

(ii) An investment plan or arrangement, or

(iii) Any other plan or arrangement, if the principal purpose of the entity, plan, or arrangement, based on objective evidence, is the avoidance or evasion of Federal income tax. The

SAFE HARBORS-IRS' OWN REGULATIONS-EXH G

See Pertinent Pages 43a, 44a

principal purpose of an entity, plan or arrangement is the avoidance or evasion of Federal income tax if that purpose exceeds any other purpose. See section 1.269-3(a). Typical of tax shelters are transactions structured with little or no motive for the realization of economic gain, and transactions that utilize the mismatching of income and deductions, overvalued assets or assets with values subject to substantial uncertainty, nonrecourse financing, financing techniques which do not conform to standard commercial business practices, or the mischaracterization of the substance of the transaction. The existence of economic substance does not of itself establish that a transaction is not a tax shelter if the transaction includes other characteristics that indicate it is a tax shelter.

(2) Principal purpose.

The principal purpose of an entity, plan or arrangement is not the avoidance or evasion of Federal income tax if the entity, plan or arrangement has as its purpose the claiming of exclusions from income, accelerated deductions or other tax benefits in a manner consistent with the statute and Congressional purpose. For example, an entity, plan or arrangement will not be considered to have as its principal purpose the avoidance or evasion of Federal income tax merely as a result of the following uses of tax benefits provided by the Internal Revenue Code: The claiming of the investment credit under section 38; the purchase or holding of an obligation bearing interest which is excluded from gross income under section 103; entering into a safe-harbor lease transaction under section 168(f)(8); taking an accelerated cost recovery system (ACRS) allowance under section 168; taking

SAFE HARBORS-IRS' OWN REGULATIONS-EXH G

See Pertinent Pages 43a, 44a

the percentage depletion allowance under section 613 or section 613A; deducting intangible drilling and development costs as expenses under section 263(c); establishing a qualified retirement plan under the provisions of sections 401-409A, claiming the possession tax credit under section 936; or claiming tax benefits available by reason of an election under section 992 to be taxed as a domestic international sales corporation (DISC), under section 927(f)(1) to be taxed as a foreign sales corporation (FSC), or under section 1362 to be taxed as an S corporation.

(c) Tax shelter item.

An item of income, gain, loss, deduction or credit will be considered a "tax shelter item" if the item is directly or indirectly attributable to the principal purpose of a tax shelter to avoid or evade Federal income tax. Thus, if a partnership is established for the principal purposes of the avoidance or evasion of Federal income tax by acquiring and overvaluing property for the purpose of claiming the investment credit under section 38, the investment credit with respect to the property would be a tax shelter item. However, a deduction claimed in connection with a separate transaction carried on by the same partnership is not a tax shelter item if the transaction does not constitute a plan or arrangement the principal purpose of which is the avoidance or evasion of tax.

(d) Reasonable belief.

For purposes of section 6661, a taxpayer will be considered reasonably to believe that the tax treatment of an item is more likely than not the proper tax treatment if--

SAFE HARBORS-IRS' OWN REGULATIONS-EXH G

See Pertinent Pages 43a, 44a

(1) The taxpayer analyzes the pertinent facts and authorities in the manner described in section 1.6661-3(b)(3) and, in reliance upon that analysis, reasonably concludes that there is a greater than 50-percent likelihood that the tax treatment of the item will be upheld in litigation if the claimed treatment is challenged by the Internal Revenue Service; or

(2) The taxpayer in good faith relies on the opinion of a professional tax advisor, if the opinion is based on the tax advisor's analysis of the pertinent facts and authorities in the manner described in section 1.6661-3(b)(3) and unambiguously states that the tax advisor concludes that there is a greater than 50-percent likelihood that the tax treatment of the item will be upheld in litigation if the claimed tax treatment is challenged by the Internal Revenue Service.

(e) Pass-through entities.

In the case of tax shelter items (as defined in paragraph (e) of this section) attributable to a pass-through entity (as defined in section 1.6661-4(e)), the actions described in paragraphs (d) (1) and (2) of this section, if taken by the entity, will be deemed to have been taken by the taxpayer and will be considered in determining whether the taxpayer reasonably believes that the tax treatment of an item is more likely than not the proper tax treatment.

[T.D. 8017, 50 FR 12017, Mar. 27, 1985]

EXHIBIT H

Fisher 10th Circuit, et al Cir--Right to an Explanation
See Pertinent Pages 45a, 49a

United States Court of Appeals for the Tenth Circuit
ROBERT D. FISHER AND ORPHA L. FISHER,
Petitioners-Appellants,
v.
COMMISSIONER FOR INTERNAL REVENUE,
Respondent-Appellee.

Docket No. 93-9029
Date of Decision: January 23, 1995
Judge: McKay, Monroe G.

Tax Analysts Citation: 1995 TNT 35-17
Parallel Citations: 75 AFTR2d Para. 95-538;
95-1 USTC Para. 50,113;
45 F3d 396
Principal Code Reference: Section 6661

Summary
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TENTH CIRCUIT REVERSES TAX COURT ON PENALTY WAIVER, SAYS IRS MUST EXPLAIN WHY IT REFUSED TO WAIVE PENALTY.

The IRS disallowed deductions claimed by Robert and Orpha

Fisher 10th Circuit, et al Cir--Right to an Explanation
See Pertinent Pages 45a, 49a

Fisher with respect to their participation in a reinsurance program. Under theterms of the five-year reinsurance contract, the couple were to make payments to an insurance company and indemnify it for administrative expenses and claims under prepaid legal services insurance contracts issued by the company. The Fishers deducted the payments on the advice of a management company retained by a principal of the insurance company to provide legal and accounting services.

The Fishers substantially understated their tax liability on their 1983 and 1985 returns. The IRS determined deficiencies and additions to tax for substantial understatement. The Fishers filed a Tax Court petition challenging the additions on the ground that the IRS abused its discretion by failing to waive the additions. The Tax Court sustained the additions to tax, and the Fishers appealed. (For a summary, see Tax Notes, Jan. 11, 1993, p. 187; for the full text, see 92 TNT 260-21.)

The Tenth Circuit has reversed and remanded, holding that the IRS abused its discretion by failing to waive the additions to tax. Senior Circuit Judge Monroe G. McKay reasoned that the IRS never gave a reason for its refusal to waive the additions to tax and, thus, the Tax Court had no basis for determining what reasons the IRS may have relied on in making its decision. "The IRS," the court explained, "cannot make taxpayers haul it into Tax Court to ascertain that it has ruled on a lawful request or to discover what the rationale for its decision is." Judge McKay instructed the Tax Court to

Fisher 10th Circuit, et al Cir--Right to an Explanation
See Pertinent Pages 45a, 49a

order the IRS to reconsider the Fishers' request for a waiver and to provide a written explanation for its decision.

Full Text
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APPEAL FROM THE UNITED STATES TAX COURT

Case No. 28630-89

William E. Farrior of Barrow, Gaddis, Griffith & Grimm, Tulsa, Oklahoma, for Petitioners-Appellants.

Anthony T. Sheehan, Attorney, Tax Division (Loretta C. Argrett, Assistant Attorney General, and Ann B. Durney, Attorney, Tax Division, with him on the brief), Department of Justice, Washington, D.C., for Respondent-Appellee.

Before Tacha and McKay, Circuit Judges, and Hansen, /*/ District Judge.

McKAY, CIRCUIT JUDGE.

The appellants, Mr. and Mrs. Fisher, were assessed a

twenty-five percent penalty for substantially underreporting their taxable income in 1983 and 1984. 26 U.S.C. section 6661(a). (The Fishers had previously reached an agreement with the IRS on the amount of the deficiency for those years.) On May 25, 1989, the Fishers sought a waiver of these penalties under 26 U.S.C. section 6661(c), which provides the Commissioner of the Internal Revenue Service with the authority to waive the penalty if the taxpayer shows reasonable cause for the understatement and demonstrates that he or she acted in good faith. The Fishers offered a credible argument that they qualified for the waiver. As far as we can determine from the record, the only response from the Commissioner was a supplementary notice of deficiency that was sent on September 1, 1989. Interpreting this as a denial of the waiver, the Fishers then sought review in the Tax Court, where the IRS argued, and the Tax Court agreed, that the Commissioner had reasonable grounds for refusing to grant the waiver.

The sole issue in this appeal is whether the Tax Court correctly held that the Commissioner of the Internal Revenue Service did not abuse her discretion in declining to waive the penalty for substantial understatement of tax against the Fishers. We find that the Tax Court erred, and we reverse.

The Tax Court found that there were adequate reasons for the Commissioner to have refused to waive the penalty, and thus concluded that she had not abused her discretion. The problem with this conclusion is that the Tax Court had no basis for determining what reasons the Commissioner may have relied upon in making her decision because she never ruled explicitly

Fisher 10th Circuit, et al Cir--Right to an Explanation
See Pertinent Pages 45a, 49a

on the request for waiver nor provided a written explanation for it. It is not enough that her decision could have been, or even probably was, based on sound reasons. "It is an elementary principle of administrative law that an administrative agency must provide reasons for its decisions." Harberson v. NLRB, 810 F.2d 977, 984 (10th Cir. 1987) (citing SEC v. Chenery Corp., 318 U.S. 80, 94 (1943)).

[T]he administrative adjudicator, by written opinion, [must] state findings of fact and reasons that support its decision. These findings and reasons must be sufficient to reflect a considered response to the evidence and contentions of the losing party and to allow for a thoughtful judicial review if one is sought.

Public Service Co. of New Mexico v. FERC, 832 F.2d 1201, 1207 n.5 (10th Cir. 1987) (quoting Harborlite Corp. v. ICC, 613 F.2d 1088, 1092 (D.C. Cir. 1979)).

By failing to rule specifically on the request for waiver and by failing to offer any reasons for her decision, the Commissioner failed to demonstrate that she had exercised her discretion and thereby abused that discretion. Although the IRS attempted to justify the denial before the Tax Court, this effort was too little, too late. The IRS cannot make taxpayers haul it into Tax Court to ascertain that it has ruled on a lawful request or to discover what the rationale for its decision is.

The judgment of the Tax Court is reversed. This matter is remanded to the Tax Court with directions to order the

Fisher 10th Circuit, et al Cir--Right to an Explanation
See Pertinent Pages 45a, 49a

Commissioner to reconsider the Fishers' request for a waiver and provide a written explanation for her decision, whatever it may be.

REVERSED AND REMANDED.

FOOTNOTE

/*/ Honorable C. LeRoy Hansen, United States District Judge for the District of New Mexico, sitting by designation.

END OF FOOTNOTE

APPENDIX I

Your Rights as a Taxpayer IRS Publication 1

Your Rights as a Taxpayer

IRS
Department of the Treasury
Internal Revenue Service
Publication 1
(Rev. December 1998)

THE IRS MISSION

PROVIDE AMERICA'S TAXPAYERS TOP QUALITY SERVICE BY HELPING THEM UNDERSTAND AND MEET THEIR TAX RESPONSIBILITIES AND BY APPLYING THE TAX LAW WITH INTEGRITY AND FAIRNESS TO ALL.

Declaration of Taxpayers Rights * * *

VIII. Relief From Certain Penalties and Interest

The IRS will waive penalties when allowed by law if you can show you acted reasonably and in good faith or relied on the incorrect advice of an IRS employee. We will waive interest that is the result of certain errors or delays caused by an IRS employee.

APPENDIX J

Taxpayers' Waiver-Abatement Request Letter

Frances L. & Gary L. Rambacher
1208 Apache Trail
Ironton, Ohio 45638
(614) 532-5544
November 12, 1996

Mr. Elmer L. Craig, Appeals Officer
Louisville Appeals Office
Suite 1010 Heyburn Bldg.
332 W. Broadway
Louisville, KY 40202-2118

Dear Mr. Craig:

We respectfully request that the negligence penalty not be charged.

We looked at the economics of the Barrister partnership along with other partnerships. We passed up the other partnerships.

We took reasonable steps. After reviewing the private placement offering subject to securities laws, we asked questions and got logical answers from Barrister's. We did realize that the IRS had not taken action on similar transactions occurring at least three years before. In addition to our own professional thinking, we discussed Banister's with the IRS taxpayers' service and with two independent professionals. We took in consideration that the partnership was openly asking that

investors have their professional advisors review the investment. We took in consideration the reputable parties we were dealing with. They were reputable national publishers; distributors; authors; general partners who are securities-tax law attorneys-CPA and Public Accountant; and independent tax law firms with outstanding credentials. We took in consideration that these reputable parties had much to lose and at risk.

Our due diligence was not at fault. It is our understanding it was the sham and fraud that occurred. That sham and fraud were that national reputable publishers reduced the sale price of book properties from approximately 25 million dollars to an amount !ess than I million. The transaction was not an arms length transaction.

We also enclose the note, which you should have a copy, from the IRS penalty coordinator which supports the removal of the penalty. It does not mention the partnership sham and fraud, but the 1986 tax !aw. The 1986 tax law spelled out that taxpayers who do not use partnership K-I figures are subject to the negligence penalty. We did use the proper information.

Keep in mind the following items.

Negligence is determined at the partner's level and at the time the transaction occurred.

Taxpayers' Waiver-Abatement Request Letter

At the 1986 IRS-partnership closing conference, the IRS through Mr. Frame told investors in response to a specific question that this was not a sham transaction, there were real activities and the IRS is not asserting that any fraud was perpetrated.

When the IRS issued the final partnership adjustment, IRS's Mr. G. Heller told the taxpayers by telephone October, 1989 that he was personally involved with the disallowance of the investment tax credit, that the transactions were bonafide, that the issue was of profit motive.

If you feel our thinking is wrong, please immediately explain in detail those areas so we can address them.

Thank you for your prompt response.

Sincerely,

S/ Frances L.Rambacher
Frances L. Rambacher

S/ Gary L. Rambacher
Gary L. Rambacher

Handwritten note from the Internal Revenue Service Attached to Taxpayers' Abatement Request Letter

Department of the Treasury
Internal Revenue Service

Atlanta, GA 39901

Date: June 25, 1996

Re: You Inquiry dated
June 12, 1996

Taxpayer identification number:
277-40-3453

Tax period:
1981 & 1983

Dear Ms. Rambacher,

Your case files have been forwarded to the Cintinnati Appeals Area as docketted cases under Docet #107, based on your Tax Court petition. A copy of this letter will be forwarded to your files. The Tax Reform Act of 1986 expands the language of negligence, but does not negate your position. The basis of your argument must contest the provision of TEFRA law which allows the IRS to prosecute partnership disallowances, such as yours. Please consult your tax attorney for additional information.

Signature
S/ David P. Coley
Title: Penalty Coordinator/Atlanta Serv. Ctr.

Employee number

Form 5260 (Rev. 6-89)

APPENDIX K

Placement Tax Opinion-Series 124
See Pertinent Page 56a, 57a, 59a, 60a

EISENBERG HONIG & FOGLER
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NEW YORK, NEW YORK IOOI6
(212) 683-9360
CABLE: LEVEHON NEW YORK
TELEX: 129178

COUNSEL
DAVID B. BROOKS
SIMOS C. DIMAS
EMIL SEBETIC

AN OPINION SUBSTANTIALLY IN THE FORM SET FORTH HEREIN WILL BE DELIVERED AT THE CLOSING ASSUMING THERE ARE NO MATERIAL CHANGES IN THE FACTS OR LAW PRIOR TO THAT DATE

BARRISTER ASSOCIATES
371 Merrick Road
Rockville Centre, NY 11570

Re: Private Placement Memorandum Dated August 10, 1983 and Offering and Sale of Units in BARRISTER EQUIPMENT

ASSOCIATE,S--SERIES ONE HUNDRED TWENTY-FOUR, L.P.

Placement Tax Opinion-Series 124
See Pertinent Page 56a, 57a, 59a, 60a

Gentlemen:

BARRISTER EQUIPMENT ASSOCIATES, SERIES ONE HUNDRED TWENTY-FOUR, L.R, a Delaware limited partnership ("Partnership"), is offering for sale 40 Units of limited partnership interest ("Units") in the Partnership to certain investors ("Limited Partners"). You have requested our opinion about certain Federal income tax consequences of a Limited Partner's investment in the Partnership, which intends to engage in the business of printing books and manufacturing computer disks using leased equipment through transactions hereinafter described.

In preparing this opinion, we have examined: (1) the Partnership Private Placement Memorandum, dated August 10, 1983 ("Memorandum"), prepared in connection with the Offering including the Exhibits annexed thereto; (2) the Amended and Restated Certificate and Agreement of Limited Partnership of the Partnership ("Partnership Agreement"); and (3) such other documents that we have deemed necessary to render this opinion.

Our opinion is based on: (1) the documents listed above; (2) the facts set forth herein; (3) the Internal Revenue Code of 1954 ("Code"), as recently amended by the Economic Recovery Tax Act of 1981 ("1981 Tax Act") and the Tax Equity and Fiscal Responsibility Act of 1982 ("1982 Tax Act"); (4) the existing and proposed Treasury regulations and existing administrative rulings of the Internal Revenue Service ("IRS"); and (5) the relevant judicial decisions. This opinion has been prepared in accordance with the Tax Opinion guidelines established by the IRS and American Bar Association.

Placement Tax Opinion-Series 124
See Pertinent Page 56a, 57a, 59a, 60a

SUMMARY OF OPINION

This summary is subject to the facts and any qualifications set forth later in the discussion of each subject.

Partnership Tax Status. In our opinion:

(a) The Partnership will bc treated as a partnership for Federal income tax purposes; and

(b) If the IRS were to challenge the validity of the status of the Partnership, it is more likely than not that the IRS challenge would be rejected by the Courts.

Profit Objective. In our opinion:

(a) The activities of the Partnership will be entered into with the intent of making a profit; and

(b) If the IRS were to challenge the profit motives and reasonable expectation of profits to be derived from the Partnership's business, it is more likely than not that such a challenge would be rejected by the Courts.

***Lease** Tax Status.* In our opinion:

(a) The leases to the Partnership will be considered *bona fide* leases for Federal income tax purposes;

(b) All lease rentals will be deductible by the Partnership as ordinary and necessary operating expenses; and

(c) If the IRS were to challenge the validity of any of the leases and the deductibility of rentals thereunder, it is more

Placement Tax Opinion-Series 124
See Pertinent Page 56a, 57a, 59a, 60a

likely than not that the IRS challenge would be rejected by the Courts.

Investment Tax Credit. In our opinion:

(a) Each Property (as hereinafter defined) purchased by the Lessor (as hereinafter defined) and leased to the Partnership will be new "Section 38" property in the hands of the Lessor eligible for the Investment Tax Credit (" ITC");

(b) The Lessor will be entitled to the ITC as purchaser of each Property, and as Lessor, upon making a proper election, will be entitled to pass through the ITC to the Partnership as Lessee;

(c) The Partnership as Lessee will be entitled to receive the pass through of the ITC from the Lessor for each Property;

(d) The Partnership as Lessee will be entitled to the ITC on each Property as placed in service each year based on the fair market value which should be equal to the Lessor's cost thereof (cash and full recourse note);

(e) Each Limited Partner should be entitled to claim on his individual Federal income tax return his pro rata share of the Lessor's ITC as passed through to the Partnership;

(0 The at-risk limitations apply only to the Lessor in a lease transaction where the Lessor elects to pass through its ITC to the Lessee;

(g) The Lessor is at-risk at all times for the entire purchase price of each Property; and therefore, the at-risk limitations do not limit the full use of the Lessor's ITC by the Partnership or the Limited Partners;

(h) If the IRS were to attempt to allocate a portion of the Lessor's purchase price for each Property to an intangible interest separate from the tangible Property, it is more likely

than not that the IRS attempt would be rejected by the Courts; and

(i) If the IRS were to attempt to reduce the ITC cost basis of the Lessor for each Property for any reason, such as: (1) non arms-length, (2) nonrecourse debt, (3) contingent debt, or (4) sham transaction, it is more likely than not that such an attempt would be rejected by the Courts.

Limited Partner's Adjusted Basis. In our opinion, each Limited Partner's adjusted basis for each Unit in the Partnership will be $25,000 in 1983 and an additional $25,000 in 1984.

Limited Partner's At-Risk Amounts. In our opinion, each Limited Partner will be at-risk in 1983 for $25,000 pertUnit of cash invested in 1983, and $25,000 in 1984 when his promissory note is paid.

Penalties. In our opinion:

(a) The Partnership and the Partners with respect to their investments in the Partnership should not be subject to any penalties for overstatement of value, or understatement of tax; and (b) If the IRS were to assert such penalties it is more likely than not that such would be rejected by the Courts.

Overall Conclusions. In our opinion, except as otherwise qualified herein:

(a) The Partnership's proposed treatment of the Federal income tax consequences of the transactions discussed herein is proper; and

(b) It is more likely than not that the bulk of the tax benefits projected for Limited Partners in this Partnership are allowable under Federal Income tax laws and should survive any IRS challenges.

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